THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not reportable

Case no: 136/2023

In the matter between:

CITY OF TSHWANE METROPOLITAN MUNICIPALITY **APPELLANT**

and

GLOFURN (PTY) LTD **RESPONDENT**

Neutral citation: *City of Tshwane Metropolitan Municipality v Glofurn (Pty) Ltd* (136/2023) [2024] ZASCA 101 (19 June 2024)

Coram: MBATHA and MATOJANE JJA, and TOLMAY, SMITH and BLOEM AJJA

Heard: 23 February 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 19 June 2024.

Summary: Civil law and procedure – whether the municipality was entitled to implement credit control measures against the company; whether the dispute lodged under s 102(2) of the Local Government: Municipal Systems Act 32 of 2000 remained unresolved – thereby precluding the municipality from implementing debt collection measures; whether the high court correctly treated

an approved policy of a municipality as a nullity when not challenged in review proceedings; requirements for an interdict satisfied.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Janse van Nieuwenhuizen J, sitting as court of first instance):

The appeal is dismissed with costs, including costs of two counsel where so employed.

JUDGMENT

Mbatha JA (Matojane JA and Smith and Bloem AJJA concurring):

Introduction

[1] This appeal concerns whether the City of Tshwane Metropolitan Municipality (the City) was entitled to implement credit control measures against Glofurn Pty Ltd (Glofurn) by threatening to disconnect the electricity supply to its premises. The key issue is whether Glofurn's dispute lodged under s 102(2) of the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act) remained unresolved, thereby precluding the City from implementing such measures. The Gauteng Division of the High Court, Pretoria (the high court) granted an interim interdict in favour of Glofurn, interdicting the City from disconnecting Glofurn's electricity supply pending resolution of the dispute. The City now appeals against this order.

Background facts

[2] The background facts are largely common cause. The dispute between the City and Glofurn relates to two accounts for electricity. One is a post-paid account, and the other is a pre-paid account. Both these accounts appear in the City records. Account number 20[…] is an old post-paid account allocated to Glofurn. This account was closed by the City as of 1 March 2022. After the closure of the old account, the City migrated Glofurn to a pre-paid system and allocated account number 50[…].

[3] Although Glofurn did not receive any invoices from the City, since the closure of the old account number, it continued to make average payments to the old account. By June 2022, the old account was in credit in the amount of R400 000.00. On the other hand, the City continued to bill Glofurn using the new account. The City issued the first invoice on 29 June 2022, reflecting that Glofurn was in arrears in the amount of R766 457.81. Glofurn disputed that it was in arrears, as alleged by the City.

[4] The City countered by stating that notification for migration of the post-paid account to the pre-paid account was dispatched to Glofurn's email address on their system. In addition, it stated that the electricity had not been charged to Glofurn's old account since the migration. Glofurn was invited to view their balance on the pre-paid portal using the City's accompanying link. Despite this response, Glofurn continued to make payments into the old account.

[5] This prompted Glofurn to lodge a formal dispute in terms of s 95*(f)* read with s 102(2) of the Systems Act with the City. The dispute was couched as follows:

'The account does not belong to the complainant, the complainant never applied for an account, never opened an account, did not receive any documents, application forms, meter readings, rates and taxes or any account before 29 June 2022. The complainant denies that it is indebted to the City in respect of the amount of R 766 457,81.'

[6] As the City threatened to cut off its electricity services to it, Glofurn launched an urgent application to the high court where it sought an order interdicting the City from implementing its debt collection and credit control measures at its premises in Koedoespoort, Pretoria, pending the determination of the dispute between itself and the City. It also sought an order for costs on an attorney and client scale against the City. The application was opposed by the City on the basis that Glofurn had been notified of the migration from the post-paid to the pre-paid system as far back as in 2021. In addition, as of 28 February 2022, it was provided with the bank details and advised to keep a positive balance on the new account. The City maintained this stance even when Glofurn sought an undertaking that pending the dispute resolution process, the City should not implement its debt collection and credit control measures.

[7] On 25 October 2022, the high court (per Jansen van Nieuwenhuizen J) granted the interdictory relief in favour of Glofurn, together with a costs order. The subsequent application for leave to appeal by the City was dismissed by the high court. The appeal serves before us with leave granted by this Court on 27 January 2023.

The parties' submissions

[8] The City submitted that the high court erred in declaring its policy a nullity in urgent interdict proceedings, which is contrary to the principles set out by the Constitutional Court in *National Treasury and Others v Opposition to Urban Tolling Alliance*.[1] The Constitutional Court in that case expressed itself as follows:

'Under the Setlogelo test, the prima facie right a claimant must establish is not merely the right to approach a court in order to review an administrative decision. It is a right to which,

[1] *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC).

if not protected by an interdict, irreparable harm would ensue. An interdict is meant to prevent future conduct and not decisions already made. Quite apart from the right to review and to set aside impugned decisions, the applicants should have demonstrated a prima facie right that is threatened by an impending or imminent irreparable harm. The right to review the impugned decisions did not require any preservation *pendente lite*.'[2]

[9] In addition, the City argued that the high court was wrong in finding that its Credit Control and Debt Policy[3] (the policy) was unenforceable against its customers. It was submitted that this finding was made in urgent interdictory proceedings without directly attacking the policy. The significance of this is that the case argued by Glofurn differed from the case pleaded in its founding affidavit. It was emphasized that since the finding by the high court was made on the premise of an issue that was not before the court, Glofurn was not entitled to the relief granted by the high court. The City maintained its stance that the dispute had been resolved and that there was no outstanding dispute between the parties.

[10] Glofurn countered by contending that there was no merit in the argument presented by the City in that the case made out in the founding affidavit was different from the one argued before the high court. It submitted that once the dispute remained unresolved, the City was precluded by s 102(2) of the Systems Act from implementing its policy. Glofurn submitted that during the legal argument, it relied on various legal provisions, including the Standard Electricity By-laws,[4] in support of its contention that the disputes had not been resolved. As a result, the question of whether the City's policy should have been preferred over the promulgated By-laws constituted a legal argument.

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[2] Ibid para 50.
[3] City of Tshwane Metropolitan Municipality, Credit Control and Debt Management Policy for the 2022/23 financial year.
[4] City of Tshwane Metropolitan Municipality Standard Electricity Supply By-laws, GN227, 7 August 2013.

[11] Before us, Glofurn pointed out that the high court had requested supplementary heads of argument to address specific legal issues, including the question of whether the policy had been properly adopted. As a result, all the issues were fully ventilated before the high court. Relying on various authorities, including the judgment in *Heckroodt NO v Gamiet*[5] it was submitted on behalf of Glofurn, that it is trite that a party in motion proceedings may advance legal argument in support of the relief or defence claimed by it even where such arguments are not specifically mentioned in the papers, provided that they arise from the facts alleged in the papers before the court. Therefore, Glofurn, contended that it was free to argue any point of law arising from the facts.

[12] Glofurn maintained that the high court did not pronounce on the validity of the policy. It submitted that the high court merely found that By-laws should be passed to give effect to the policy, that until such time as By-laws are promulgated to give effect to the policy, the policy will not be enforceable against the public and that the policy cannot be in conflict with duly promulgated By-laws. Glofurn argued that the high court correctly exercised its discretion in granting an interdict against the City. It did so by considering all the relevant facts and legal principles. For this contention, it relied on *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*,[6] wherein the court expressed itself as follows:

'A court of appeal is not entitled to set aside the decision of a lower court granting or refusing a postponement in the exercise of its discretion merely because the court of appeal would itself, on the facts of the matter before the lower court, have come to a different conclusion; it may interfere only when it appears that the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or

[5] *Heckroodt NO v Gamiet* 1959 (4) SA 244 (T) at 246A-C; also see *Van Rensburg v Van Rensburg en Andere* 1963 (1) SA 505 (A) at 509 E-510B.
[6] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1; 2000 (1) BCLR 39.

that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles. On its face, the complaint embodied in the ground of appeal sought to be introduced by the amendment does not meet this test because it alleges only an error in the exercise of its discretion by the High Court. Even assuming, however, that such ground correctly formulates the test which would permit interference by this Court, the respondents have got nowhere near to establishing such a ground, on the facts before the High Court. No such vitiating error on the part of the High Court was contended for by the respondents in their written or oral argument before this Court and none can, on the papers, be found. In fact, I am of the view that the High Court correctly dismissed the application for good and substantial reasons and that both the applications in this Court relating to such dismissal ought to be refused. The question of the appropriate costs order will be dealt with at the conclusion of this judgment.'[7]

Legal framework

[13] It is important that I should set out the relevant provisions of the applicable legislation to the dispute. Glofurn lodged a dispute in terms of s 102 read with s 95 of the Systems Act. Section 102 provides that:

'(l) A municipality may—

(a) consolidate any separate accounts of persons liable for payments to the municipality;

(b) credit a payment by such a person against any account of that person; and

(c) implement any of the debt collection and credit control measures provided for in this Chapter in relation to any arrears on any of the accounts of such a person.

(2) Subsection (1) does not apply where there is a dispute between the municipality and a person referred to in that subsection concerning any specific amount claimed by the municipality from that person.'

Section 95*(f)* should be read in line with the definition of a dispute as provided in s 1 of the policy. It states that:

'[A] dispute or complaint with regards to a specific amount charged by the Municipality and that is lodged on the prescribed forms and manner in terms of section 102 read together with sections 95 (f), (g) and (h) of the Municipal Systems Act, 2000, and the Municipality's policy requirements in this regard.'

Section 95*(f)* of the System Act provides as follows:

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[7] Ibid para 11.

'In relation to the levying of rates and other taxes by a municipality and the charging of fees for municipal services, a municipality must, within its financial and administrative capacity—

. . .

(f) provide accessible mechanisms for those persons to query or verify accounts and metered consumption, and appeal procedures which allow such persons to receive prompt redress for inaccurate accounts.'

[14] The policy also makes provision for credit control measures in clause 4,[8] applicable to properties which are in arrears in respect of municipal service charges, in respect of water or electricity or both of these services or any other municipal services that are supplied by the City. In the case where the consumer is in arrears, it allows for dispatching a reminder to such consumer to regulate its position within a period of 14 days after delivery of the notification. Should the consumer not respond within the specified period, the electricity supply and other services will be disconnected.

[15] Clause 6.1[9] of the policy prescribes how consumers can lodge a dispute with the City. It provides that:

'In the interim, the consumer will remain liable to pay the average of the last three months of the account, where the history of the account is available. Where no history is available, the consumer will be obliged to pay an estimate provided by the Municipality before the due date for payment, until the matter is resolved. The relevant department will give a written acknowledgement of receipt of a dispute, investigate the matter, and inform the customer in writing of the outcome of the investigation within one month. Any adjustments to the customer's account will be done within a reasonable time.'[10]

In addition, clause 6.1(e) provides that the decision of the authorised official of the council is final and will result in the immediate implementation of any credit control and debt collection measures provided for in the policy.

[8]City of Tshwane Metropolitan Municipality, Credit Control and Debt Management Policy for the 2022/23 financial year at 18-19.
[9] Ibid at 28.
[10] Ibid at clause 6.1(c).

[16] I also point out that the policy in clause 6.2[11] makes provision for an appeal. It states that the consumer may give notice in the prescribed form within 21 days after notification of the outcome of the dispute to the City Manager who will finally consider such disputes.[12] The City Manager will be at liberty to consider and review the decision of the dispute resolution committee.[13] Most importantly, clause 6.2.3 provides that the decision on appeal by the City Manager or the delegated official will be final.

[17] The provision of electricity is a local government competency. Amongst the general duties of a municipality set out in s 73(1)*(c)* of the Systems Act, is that a municipality must 'ensure that all members of the local community have access to at least the minimum level of basic services'. Section 73(2)*(c)* requires a municipality to be financially sustainable. In order to realise that goal, Chapter 9 of the Systems Act regulates credit control and debt collection measures for services rendered by the municipality. Section 96 of the Systems Act[14] places the responsibility for debt collection on the municipality. As a result, in terms of s 98 of the Systems Act, a municipal council must adopt By-laws to give effect to its credit control and debt collection policy, its implementation and enforcement.[15]

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[11] Ibid at 31.
[12] Ibid at clause 6.2.1.
[13] Ibid at clause 6.2.2.
[14]Section 96 of the Systems Act 32 of 2000 provides:
'**Debt collection responsibility of municipalities.**
—A municipality—
(a) must collect all money that is due and payable to it, subject to this Act and any other applicable legislation; and
(b) for this purpose, must adopt, maintain and implement a credit control and debt collection policy which is consistent with its rates and tariff policies and complies with the provisions of this Act.'
[15] Section 98 provides:
'By-laws to give effect to policy. —
(1) A municipal council must adopt By-laws to give effect to the municipality's credit control and debt collection policy, its implementation and enforcement.
(2) By-laws in terms of subsection (1) may differentiate between different categories of ratepayers, users of services, debtors, taxes, services, service standards and other matters as long as the differentiation does not amount to unfair discrimination.'

[18] It is apposite that I should highlight that the supply of electricity is by agreement between the consumer and the municipality and that the consumer is liable for the electricity supplied or consumed. In the event that the consumer fails to pay for such services, the municipality has a right to disconnect and suspend the supply thereof.

Evaluation

[19] The City's contention was that the dispute had been finalised, as envisaged in clause 6.1(e) of the policy when Glofurn was informed on 29 June 2022 that the old account was no longer in operation and that it had been migrated to a new pre-paid account. A second dispute was lodged on 8 July 2022, whereby Glofurn disavowed knowledge of the new account and that it was indebted to the City in the amount of R766 457.81. When the second dispute was lodged, the City responded on the very same day per email by Ms Lebudi, which stated that notification of the migration was sent to the email address provided in the system and that electricity was not charged to the client's old account since the migration. Glofurn was invited to view their balance on the pre-paid portal on the link provided in the email. This report by Ms Lebudi, according to the City, concluded the dispute between the parties.

[20] The City's contention that the second dispute had been resolved is in my view misplaced. As the aggrieved consumer, Glofurn, was entitled to note an appeal in terms of clause 6.2 of the policy within a period of 21 days after receipt of the City's decision. The City's argument does not address the right of appeal as envisaged in clause 6.2. Therefore, Ms Lebudi's response could not have been final. The dispute lodged in terms of s 102 remained unresolved. Glofurn had satisfied the jurisdictional factors in terms of s 102, in that it proved that it had a dispute with the City which remained unresolved. Finally, the City relied on the correspondence communicated by Ms Lebudi to Glofurn

and there was no indication of whether this was a committee or an individual decision. The position of Ms Lebudi and the capacity in which she acted remained unexplained by the City.

[21] The City contradicts itself when it contends that the application lodged before the high court was lodged simultaneously with the lodging of the second dispute. I point out that the City responded on the same day of the lodging of the dispute. Nothing suggests that the City investigated the dispute, as it was enjoined to do in terms of clause 6.1 of the policy. It merely gave a final decision without investigating the allegations by Glofurn in the second dispute. Disturbingly, on the same day of lodging the second dispute, a representative of the City telephonically contacted Glofurn and indicated that the electricity supply would be disconnected within three days. This allegation was never disputed by the City. This indicates the nonchalant and dismissive attitude of the City's officials.

[22] I conclude that the investigation should have been done by the City before dismissing the issues raised by Glofurn. Glofurn was not even afforded time to contemplate their next move before a threat to disconnect electricity was communicated to them. Glofurn acknowledged in its founding affidavit that, as a rule, the City was entitled to implement debt collection and credit control measures where there are arrears in any account. However, as correctly advanced by Glofurn, s 102(2) of the Systems Act proscribes the implementation of such measures where a dispute exists between the consumer and the municipality.

[23] It behoves me to highlight the relevant provisions of the City's By-law. Section 4(1) of the Electricity By-law provides that the provision of electricity is governed by the agreement between the City and the relevant person who has concluded the agreement with the City. Section 4(3) provides for cases where

the applicant is not the registered owner of the premises. In that case, there must be an agreement in writing between the parties which binds both the consumer and the owner of the premises. Section 18 regulates the payment for all the electricity supplied, whether metered or unmetered. The City is obligated to render an account to the consumer on a regular basis. In the event that the consumer fails to pay, the City must notify the consumer and eventually disconnect the electricity supply to the consumer's premises in terms of s 18(3). Section 18(4) provides that:

'[a]s regards the accounts envisaged in sub-section 2, an error or omission from the Municipality or failure by the Municipality to render an account does not relieve the consumer of any obligation to pay for the amount due for electricity supplied to and consumed at the premises. The onus is on the consumer to ensure that the account rendered is in accordance with prescribed tariff, charges and fees in respect of the electricity supplied to the premises'.

[24] The City's argument was that even if the amount paid in the old account was transferred into the new account, there was still a deficit. Glofurn's counter submission, amongst others, was that as early as 2022 it had installed a solar system on its premises. It had an expectation of a reduced amount due to the City. I find this to be a reasonable ground, which should have been investigated by the City. Accordingly, Glofurn had in all respects, established a clear right to have the dispute investigated before the City was entitled to disconnect the electricity supply.

[25] It must be borne in mind that electricity is a basic municipal service.[16] Section 2 of the National Energy Act 34 of 2008 provides that its objective, amongst others, is to ensure an uninterrupted supply of energy to the nation and to facilitate energy access to improve the quality of life of South African people.

[16] *Joseph and Others v City of Johannesburg and Others* [2009] ZACC 30; 2010 (3) BCLR 212 (CC); 2010 (4) SA 55 (CC) para 34.

However, the right to access electricity is not absolute. Non-payment for the provision of electricity impacts negatively on the supply thereof. As a result, Chapter 9 of the Systems Act regulates the credit control and debt collection processes of the municipality, which ensures that the consumer and the municipality can regulate their relationship and also resolve disputes between themselves.

[26] The high court correctly found that Glofurn had satisfied the requirements of an interdict. On a proper consideration of the founding affidavit, supplementary affidavits supplemented by the argument on a question of law, I find that the high court was justified in granting the order sought by Glofurn. Nothing requires this Court to interfere with the exercise of the discretion of the high court.

[27] I return to the question of law raised by the City before us, being, whether it was competent for the high court to have made a finding that the policy adopted by the City was a nullity. There is no merit in the question of law raised. The high court's comments related to the argument that the policy was unenforceable because it had not been promulgated into a By-law, as required in terms of s 98(1) of the Systems Act. The finding did not relate to the validity of the policy. It was common cause that the City did not adopt a By-law to provide for the 'implementation and enforcement' of its Credit Control Policy and in terms of s 98(1) the policy was consequently unenforceable by operation of law. Glofurn was fully entitled to raise that issue by way of a point of law without assailing the validity of the policy. The principles enunciated in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others (Oudekraal)* and *MEC for Health, Eastern Cape v Kirland Investments*,[17] (*Kirkland*) namely that

[17] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [2004] ZASCA 48; [2004] 3 All SA 1 (SCA); 2004 (6) SA 222 (SCA) para 26; *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* [2014] ZACC 6; 2014 (5) BCLR 547 (CC); 2014 (3) SA 481 (CC).

administrative decisions remain valid and effectual until set aside by a competent court, can therefore not avail the City. In any event, the high court's comments were obiter and are not legally binding. This is apparent from the fact that the order granted by the high court is silent on the status of the City's policy. The order merely granted the interdictory relief sought by Glofurn.

[28] Accordingly, I make the following order:

The appeal is dismissed with costs, including costs of two counsel where so employed.

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Y T MBATHA

JUDGE OF APPEAL

Tolmay AJA

[29] I have had the pleasure of reading the judgment of Mbatha J and I agree that the appeal should be dismissed. I am, however, of the view that the fact that the high court allowed a new point to be raised for the first time in supplementary heads of argument and then found on that point that the policy is unenforceable, need to be addressed. I also have some doubt that the pronouncement of the high court on the question of enforceability of the policy can be regarded as obiter, in light of the fact that the high court was specifically called upon to consider this issue in supplementary heads of argument.

[30] The respondent initiated urgent legal proceedings in the high court. The sole purpose was to obtain an interdict that would prevent the appellant from disconnecting the respondent's electricity supply, until the resolution of the ongoing dispute between the two parties. The high court, after examining the evidence, appropriately concluded that the respondent had presented a sufficient case to warrant the issuance of an interdict, which would remain in effect until the underlying dispute was settled.

[31] The high court, in my view erred in allowing the respondent to raise an issue regarding the validity of the policy for the first time in the supplementary heads of argument, and then finding that the policy relied upon by the appellant was unenforceable against its customers.[18] Parties are required to set out and define the nature of their case in the pleadings or affidavits. In *Fischer and Another v Ramahlele and Others*[19] this Court expressed itself as follows:

'Turning then to the nature of civil litigation in our adversarial system it is for the parties, either in the pleadings or affidavits, which serve the function of both pleadings and evidence, to set out and define the nature of their dispute and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for "it is impermissible for a party to rely on a constitutional complaint that was not pleaded". There are cases where the parties may expand those issues by the way in which they conduct the proceedings. There may also be instances where the court may *mero motu* raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone.'

[18] High court Judgment para 21 reads as follows:
'The policy relied upon by the respondent herein, has, however, not been adopted in a By-Law and is therefore not enforceable against customers.'

[19] *Fischer and Another v Ramahlele and Others* [2014] ZASCA 88; 2014 (4) SA 614 (SCA); [2014] 3 All SA 395 (SCA) para 13; See also *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (9) BCLR 1113 (CC); 2019 (6) SA 253 (CC).

[32] Although a court may, of its own accord, raise a question of law in certain instances, such questions must emerge from the evidence before it.[20] In this instance nothing was raised regarding the validity of the policy in the affidavits, nor was any review of the policy sought. The issue about the validity and enforceability of the policy would have required a substantially different response from the appellant in its affidavit. By not being granted the opportunity to address this issue in the answering affidavit and filing a record, as is required in review proceedings the appellant was prejudiced. The appellant was denied the opportunity to address the implications, financial and otherwise of how arbitration in terms of By-law 9 of the Standard Electricity By-laws, as opposed to the internal mechanisms provided by the policy, would affect it. In review proceedings the court would have been able to address any potential prejudice by granting a just and equitable remedy, in terms of s 172 of the Constitution and s 8 of The Promotion of Administrative Justice Act 3 of 2000 (PAJA).

[33] The high court was seized with an application to grant an interdict. In *National Treasury and Others v Opposition to Urban Tolling Alliance and Others*[21] (*OUTA*) the court dealt with an application in two parts: Part A was the interdict and Part B was the review, this was not done in the matter before us. The way that the application in *OUTA* was structured enabled the court to first consider whether the requirements for an interdict had been met and, after the filing of the record and supplementation of the papers, whether the requirements for a review had been met. The following was said in *OUTA*:

'A court must also be alive to and carefully consider whether the temporary restraining order would unduly trespass upon the sole terrain of other branches of Government even before the

[20] *Public Protector v South African Reserve Bank* paras 234-235; See also *Advertising Regulatory Board NPC and Others v Bliss Brands (Pty) Ltd* [2022] ZASCA 51; [2022] 2 All SA 607 (SCA); 2022 (4) SA 57 (SCA); [2022] HIPR 201 (SCA).

[21] *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC).

final determination of the review grounds. A court must be astute not to stop dead the exercise of executive or legislative power before the exercise has been successfully and finally impugned on review. This approach accords well with the comity the courts owe to other branches of Government, provided they act lawfully. Yet another important consideration is whether in deciding an appeal against an interim order, the appellate court would in effect usurp the role of the review court. Ordinarily the appellate court should avoid anticipating the outcome of the review except perhaps where the review has no prospects of success whatsoever.'[22]

In this instance there was no review application before the high court and the prospects of success of the review could therefore not be considered.

[34] The decision to implement a policy by the appellant is an administrative action and is regulated by PAJA and falls squarely within the definition of an administrative action as defined in s 1 of PAJA.[23]

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[22] Ibid para 26.

[23] Section 1 of PAJA reads as follows:

'1 Definitions

In this Act, unless the context indicates otherwise–

"administrative action" means any decision taken, or any failure to take a decision, by–

(a) an organ of state, when-

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,

which adversely affects the rights of any person and which has a direct, external legal effect, but does not include–

(aa) the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79 (1) and (4), 84 (2) *(a)*, *(b)*, *(c)*, *(d)*, *(f)*, *(g)*, *(h)*, *(i)* and *(k)*, 85 (2) *(b)*, *(c)*, *(d)* and *(e)*, 91 (2), (3), (4) and (5), 92 (3), 93, 97, 98, 99 and 100 of the Constitution;

(bb) the executive powers or functions of the Provincial Executive, including the powers or functions referred to in sections 121 (1) and (2), 125 (2) *(d)*, *(e)* and *(f)*, 126, 127 (2), 132 (2), 133 (3) *(b)*, 137, 138, 139 and 145 (1) of the Constitution;

(cc) the executive powers or functions of a municipal council;

(dd) the legislative functions of Parliament, a provincial legislature or a municipal council;

(ee) the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution or of a Special Tribunal established under section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act 74 of 1996), and the judicial functions of a traditional leader under customary law or any other law;

(ff) a decision to institute or continue a prosecution;

(gg) a decision relating to any aspect regarding the nomination, selection or appointment of a judicial officer or any other person, by the Judicial Service Commission in terms of any law;

(hh) any decision taken, or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act, 2000; or

(ii) any decision taken, or failure to take a decision, in terms of section 4 (1);

"administrator" means an organ of state or any natural or juristic person taking administrative action;

"Constitution" means the Constitution of the Republic of South Africa, 1996;

"court" means–

(a) the Constitutional Court acting in terms of section 167 (6) *(a)* of the Constitution; or

(b) (i) a High Court or another court of similar status; or

[35] The appellant is an organ of state and the decision to terminate electricity supply and the empowering provision would be the policy, as a result a review application in terms of s 6 of PAJA is required to set it aside. In my view the enforceability of the municipal policy may not be pronounced on before the matter is taken on review and set aside.

[36] In *Oudekraal*[24] it was stated as follows:

'Thus the proper enquiry in each case - at least at first - is not whether the initial act was valid but rather whether its substantive validity was a necessary precondition for the validity of consequent acts. If the validity of consequent acts is dependent on no more than the factual existence of the initial act, then the consequent act will have legal effect for so long as the initial act is not set aside by a competent court.'[25]

(ii) a Magistrate's Court for any district or for any regional division established by the Minister for the purposes of adjudicating civil disputes in terms of section 2 of the Magistrates' Courts Act, 1944 (Act 32 of 1944), either generally or in respect of a specified class of administrative actions, designated by the Minister by notice in the *Gazette* and presided over by a magistrate, an additional magistrate or a magistrate of a regional division established for the purposes of adjudicating civil disputes, as the case may be, designated in terms of section 9A;

within whose area of jurisdiction, the administrative action occurred or the administrator has his or her or its principal place of administration or the party whose rights have been affected is domiciled or ordinarily resident or the adverse effect of the administrative action was, is or will be experienced;

"decision" means any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to–

(a) making, suspending, revoking or refusing to make an order, award or determination;

(b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;

(c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;

(d) imposing a condition or restriction;

(e) making a declaration, demand or requirement;

(f) retaining, or refusing to deliver up, an article; or

(g) doing or refusing to do any other act or thing of an administrative nature,

and a reference to a failure to take a decision must be construed accordingly;

"empowering provision" means a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken;

"failure", in relation to the taking of a decision, includes a refusal to take the decision;

"Minister" means the Cabinet member responsible for the administration of justice;

"organ of state" bears the meaning assigned to it in section 239 of the Constitution;

"prescribed" means prescribed by regulation made under section 10;

"public", for the purposes of section 4, includes any group or class of the public;

"this Act" includes the regulations; and

"tribunal" means any independent and impartial tribunal established by national legislation for the purpose of judicially reviewing an administrative action in terms of this Act.'

[24] *Oudekraal* fn 17 above.

[25] Ibid para 31.

This approach was also confirmed and applied in *Kirland*[26] and *Merafong City v AngloGold Ashanti*.[27] (*Merafong*)

[37] It would seem that the high court was swayed by the minority judgment in *Department of Transport and Others v Tasima (Pty) Limited*[28] which found that: 'An invalid administrative act that does not exist in law cannot itself have legal force and effect.'[29]

[38] The majority however confirmed the principle set out in *Oudekraal* and the line of cases that followed it was stated as follows:

'146. But these sentiments did not prevail in those cases. The majority judgment in *Kirland* held that the Court should not decide the validity of the decision because "the government respondents should have applied to set aside the approval, by way of formal counter application." In the absence of that challenge – reactive or otherwise – the decision has legal consequences on the basis of its factual existence. One of the central benefits of this approach was said to be that requiring a counter-application would require the state organ to explain why it did not bring a timeous challenge. The same was required of the Municipality in *Merafong*.'[30]

[39] In conclusion, I therefore find that the high court was not empowered to allow the point of validity of the policy to be raised in the supplementary heads of argument for the first time. And to pronounce on the enforceability of the

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[26] *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* [2014] ZASCA 48; [2014] (5) BCLR 547 (CC); 2014 (3) SA 481(CC) paras 64-66, 68 and 87.

[27] *Merafong City Local Municipality v AngloGold Ashanti Limited* [2016] ZACC 35; 2017 (2) BCLR 182 (CC); 2017 (2) SA 211 (CC) paras 40-42.

[28] *Department of Transport and Others v Tasima (Pty) Limited* [2016] ZACC 39; 2017 (1) BCLR 1 (CC); 2017 (2) SA 622 (CC) paras 87-88, 121, 145-146.

[29] Ibid paras 87-88 reads as follows:

'The Supreme Court of Appeal's reliance on *Oudekraal* here was mistaken. Nowhere does *Oudekraal* say that an administrative action performed in violation of the Constitution should be treated as valid until set aside. Much worse, that its unlawfulness does not matter as long as it is not set aside and that a delay in challenging it validates the action concerned. As mentioned, this proposition turns the supremacy of the Constitution principle on its head.

On the contrary *Oudekraal* lays down a narrower principle that applies in specific circumstances only. That principle draws its force from the distinction between what exists in law and what exists in fact. An invalid administrative act that does not exist in law cannot itself have legal force and effect. Yet the act may still exist in fact, for example an administrative act performed without legal power. It exists in fact until set aside on review. However, since the act does not exist in law, it can have no binding effect.'

[30] Ibid para 146. See also *Magnificent Mile Trading 30 (Pty) Limited v Charmaine Celliers NO and Others* [2019] ZACC 36; 2020 (1) BCLR 41 (CC); 2020 (4) SA 375 (CC) para 43.

policy in the absence of a review application to set aside the decision. The high court was however correct in granting the interdict.

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R G TOLMAY

ACTING JUDGE OF APPEAL

Appearances

For the appellant:	J A Motepe SC with M S Manganye
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